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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,

v.

FACTORS & FINANCE COMPANY.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, *Petitioner*,
v.
FACTORS & FINANCE COMPANY.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

This Court has held that long continued departmental rulings and practice will be given great weight. *United States* v. *Alabama G. S. R. Co.*, 142 U. S. 615, 621; *United States* v. *Jackson*, 280 U. S. 183, 193; *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 182; *Brewster* v. *Gage*, 280 U. S. 327, 336.

The departmental practice in the matter of amendments to refund claims has been determined judicially. In *Magnolia Petroleum Co.* v. *United States*, 63 C. Cls. 173, 188, in paragraph XX of the Findings, the Court found the following facts:

> XX. It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the Bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III–1, page 350.[1]

[1]The modification in L. O. 1116 was that amendments came too late after the claim had been rejected.

Departmental rulings indicating the practice which was administered from 1921 to 1929 are:

Regulations No. 14, Revised, were approved by the Secretary of the Treasury and promulgated on January 25, 1916. These Regulations were entitled "Instructions Concerning the Abatement and the Refunding of Taxes and Penalties."

Regulations 14 apparently form the basis for the Regulations which followed, as will appear from paragraph one on page 25, and the first paragraph of subject matter on page 27. On page 28, in the last paragraph thereof, it is stated:

> Claims for the abatement and refunding of taxes and redemption of stamps, when received at this office, are recorded, and if they are afterwards returned to the collector for amendment, they should in all cases be returned to this office; *even if new claims are prepared, such new claims should be considered as amendments to the original claims and should be inclosed therein.* If for any reason the claims are returned to the claimants, claimants should be instructed to return the original claims. (Italics supplied.)

Treasury Decision 3240, 5 C. B. 313, approved by the Secretary of the Treasury and promulgated on October 31, 1921, which was not modified or revoked until 1928, contains the following provisions:

> Where any case in the Bureau of Internal Revenue has been finally closed after the taxpayer, or other party thereto, has had a hearing or has been afforded by written notice an opportunity to *present oral or written arguments or statements of fact in support of his contentions*, the case will not be re-opened except (1) where a showing is made of *new and material facts*, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue, of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction. The application for reopening a case should be addressed to the Commissioner of Internal Revenue, should state succinctly the facts and circumstances upon which the application is based, and must be supported by the affidavit of a person having knowledge of the facts.

> This decision is not to be construed as modifying the regulations relating to the filing of claims in abatement or claims for refund, nor as denying the right of a taxpayer to a hearing or to an appeal at any stage of his case until the case has been finally closed. *After the taxpayer has exhausted his remedies within the Bureau, however, and the case has been finally closed*, it will be reopened only under the conditions stated in the decision. (Italics supplied.)

The above ruling indicates that the *facts in support of a claim* may be presented either orally or in writing; and that *new and material facts* may be presented, upon reconsideration, after claim has been rejected.

Law Opinion 1116, C. B. III–1, p. 350, was approved by the Secretary of the Treasury and promulgated on May 26, 1924. Therein the executors of an estate had filed a refund claim and set out their grounds in support thereof. The claim was rejected *in toto* and thereafter the executors wrote a letter to the Commissioner asking for reconsideration of the claim on new and different grounds. The ruling held that since the claim had been rejected before the proposed amendment the claim would not be reopened upon the proposed amendment. The decision throughout is made to turn upon the principle that after the rejection of the claim, the claim might not be amended. However, in the course of the Opinion, it is said:

> * * * If a claim is submitted which does not sufficiently comply with the regulations to entitle it to consideration upon its merits by the Commissioner, it is, however, as will hereafter be shown, *sufficient to toll the statute of limitations relating to the filing of claims*,[2] and may also be considered a claim, subject to being perfected later, for the purpose of allowing interest thereon from six months after the date of filing, under the provisions of section 1324 (a) 3 of the Revenue Act of 1921. (Italics supplied.)

Further on in the same Opinion, it is said:

> It is conceivable that an elaboration of the grounds relied upon by a claimant to obtain a refund of taxes might, after his claim was filed, be desirable or necessary, and the insertion, under the prescribed regulations, of such additional matter in support of the grounds specified,

[2]See opinion of Court below in second full paragraph R. 23.

> would properly be denominated an amendment of the claim. This, however, is not such a case. Here the claimant set up an entirely new ground having not even the remotest connection with or reference to the grounds originally specified, and, *it is to be noted, not until some months after the original claim had been finally rejected.* (Italics supplied.)

General Counsel's Memorandum 602, C. B. V–2, p. 97, was promulgated in the Autumn of 1926. In that ruling, the taxpayer filed no claim for refund until after the expiration of the statutory period. However, before the expiration of that period, the taxpayer's brother, purporting to act on taxpayer's behalf, filed a claim for refund. The claim was in the name of the taxpayer, but was signed by the taxpayer's brother who stated that taxpayer was out of the country and that the claim was being filed under a general power of attorney which had been lost. After his return taxpayer filed a refund claim accompanied by an affidavit stating that he had given his brother a general power of attorney to act for him in all business transactions. The question was whether the refund claim filed by the taxpayer after the expiration of the statutory period would be considered an amendment of a claim filed on his behalf by his brother.

The Commissioner ruled that the timely claim filed by the brother was defective, but that such defect was one which could be remedied by later action, and held that such claim was perfected by the filing of a refund claim by the taxpayer himself after the statutory period had expired. The ruling further held that it was in harmony with Law Opinion 1116, *supra*.

Treasury Decision 4235, C. B. VII–2, p. 76, was approved by the Secretary of the Treasury and promulgated on October 23, 1928. It provides the circumstances under which claims will be reopened and reconsidered upon their merits after their rejection by the Commissioner, as well as the procedure to be followed. This Treasury Decision is in four paragraphs. Paragraph III is as follows:

> Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration of the

statute of limitations *for bringing suit*, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening. (Italics supplied.)

Paragraph IV of Treasury Decision 4235 revokes Treasury Decision 3240, *supra*.

Treasury Decision 4265, C. B. VIII–1, p. 110, was approved by the Secretary of the Treasury and promulgated on March 27, 1929, and made prospectively effective as of May 1, 1929. That Treasury Decision is as follows:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) *These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.* (Italics supplied.)

Treasury Decision 4265 was promulgated while the instant cause was pending in the Court of Claims.

The provisions of that Treasury Decision, by its terms, apply only to refund claims filed on or after May 1, 1929. The rule insisted upon in the instant case would apply the provisions

of that Treasury Decision retroactively, which is contrary to its provisions.

Since the rule announced in Treasury Decision 4265 became effective only on and after May 1, 1929, any action of the Commissioner prior to that time in applying such rule would not make correct or proper such action of the Commissioner.

Regulations and Treasury Decisions are the highest Departmental authority. They can be changed or modified only with the approval of the Secretary of the Treasury. They can not be changed or modified by any opinion or ruling of the Commissioner or of the Solicitor. Even if during the period involved herein the Commissioner or the Solicitor had issued rulings or opinions which were not in accord with the Regulations and Treasury Decisions, such rulings were nugatory and improper. If there were such, it would tend to show that the practice was at least irregular to the extent that the practice was not in accord with the Regulations. The Regulations appear not to have been changed until Treasury Decision 4265 changed them in 1929.

A claim for refund raises the issue as to whether or not there has been an overpayment, and the amount thereof. The *issue is not* as to the specific item upon which the refund will rest.

The departmental practice was such that the *amount claimed could not be increased by amendment. Magnolia Petroleum Co.* v. *United States, supra,* page 1. Therefore, since taxpayer could not anticipate the exact amount which the Commissioner would allow, it was forced by the departmental practice to claim the amount which it had paid.

If a claim is filed which notifies the Commissioner that the taxpayer is demanding a refund of specific taxes for a specific year, paid at a specific time and to a designated collector, and thereafter adduces facts, under oath, in support of that claim, and the Commissioner considers such facts and finds the overpayment, there has been a compliance with Section 3226 R. S. and the taxpayer may sue to recover. The initial claim does not have to have the same formality in order to give the Commissioner jurisdiction to consider the claim, as would be required to support a suit in Court in the first instance. The purpose of the law is to save litigation in the Courts and to

require that the Commissioner be fully advised of all the facts and grounds *before he makes his determination.* The law does not require that all the facts be submitted *prior to any consideration of the claim by the Commissioner.* T. D. 3240, *supra*, p. 2; T. D. 4265, *supra.*

This supplementary brief is filed pursuant to permission granted by the Chief Justice at the hearing of this cause on December 8, 1932.

Respectfully submitted,

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